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IN THE

Supreme Court of the United States

October Term, 1958

No. 732

MURRAY BERMAN and MAYFLOWER MANUFACTURING CORP.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILTON C. WEISMAN
HARRY I. RAND
Attorneys for Petitioners

WEISMAN, CELLER, ALLAN, SPETT & SHEINBERG
of Counsel

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Murray Berman and Mayflower Manufacturing Corp. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 30, 1958, affirming (1) judgments of conviction previously entered against petitioners in the United States District Court for the Southern District of New York, on indictments charging (a) unlawful sales of Government-owned serge wool, in violation of 18 U. S. C. 641, and (b) a conspiracy, in violation of 18 U. S. C. 371, to make false statements in connection with such serge, in violation of 18 U. S. C. 1001; and (2) affirming the District Court's denial of petitioners' motion for a new trial filed under Rule 33 of the Federal Rules of Criminal Procedure.

Opinions Below

The opinion of the Court of Appeals has not yet been reported; it is annexed hereto as Appendix A, *infra*, pp. 28-49. The District Court wrote no opinion with respect to the trial on the indictments; its unreported opinion denying petitioners' motion for a new trial is printed in the record at R. 916-922.*

Jurisdiction

The judgment of the Court of Appeals was entered on December 30, 1958 (Appendix B, *infra*, p. 50). This Court, by order dated January 20, 1959, extended the time for filing a petition for writ of certiorari to February 28, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). The jurisdiction of the Court of Appeals was based on 28 U. S. C. 1291; that of the District Court, on 18 U. S. C. 3231.

Questions Presented

1. Whether the safeguards for the protection of the accused in a criminal case enunciated in *Holland* v. *United States*, 348 U. S. 121, should have been applied here, where, as in the traditional net worth-tax fraud prosecution, the proof primarily relied on to establish guilt was an accounting tabulation; and whether, consequently, (a) the Government had the burden of either proving all the significant

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* References designated "R." are to Defendants-Appellants' Appendix in the court below; references designated "SR." are to Defendants-Appellants' Supplemental Appendix. Certified copies of these appendices and the other record appendices filed below have been filed with Clerk of this Court, pursuant to its Rule 21 (3).

credit items as well as the debit items on such an accounting or negating the existence of such credit items, and (b) the Government made out a case for submission to the jury when the accounting tabulation it relied on erroneously omitted significant credit items tending to establish the innocense of the accused.

2. Whether it was a denial of that effective cross-examination which due process compels, to receive as competent proof of an historical fact, testimony relating to a "laboratory" experiment and the computations derived therefrom without first requiring that a proper foundation be laid by expert proof, subject to cross-examination, as to the validity, accuracy and reliability of that experimental procedure.

3. Whether the principle prevailing in the Second Circuit—that the Government makes out a case to go to the jury, though every element of the crime charged is not proved beyond a reasonable doubt, where the "totality of the evidence" is such as would sustain a jury verdict in a civil action—is the correct rule in a criminal case.

4. Whether it was proper to admit evidence as to the hearsay declarations of one whose adherence to an alleged conspiracy was never proved, to support the charge of conspiracy against his alleged co-conspirators; and, if not, whether the admission of such declarations here was so prejudicial as to require reversal of the convictions.

5. Whether the convictions of petitioners here were grounded solely on inference piled upon inference, and presumption upon presumption; and, if so, whether convictions so grounded may stand.

6. Whether the Government failed to prove that the venue of the conspiracy count of which petitioners were convicted lay in the Southern District of New York; and, if so, whether such convictions must consequently be reversed,

7. Whether a new trial was here required on the basis of evidence newly discovered by the defendants after the trial, establishing that (a) the Government's agents and attorneys had information, prior to the trial, that quantities of the Government goods with whose theft petitioners were charged had been sold by others without the knowledge of petitioners; (b) the Government failed to call this information to the attention of court and jury; and (c) the Government omitted this information in an accounting represented by it to court and jury as a full accounting.

8. Petitioners rely also upon the questions presented and argument in support thereof in the petition being filed by co-petitioners Fabric Garment Co., Inc., and Joseph Abrams.

Statutes Involved

The statutes involved are the Act of June 25, 1948, c. 645, 62 Stat. 725, 18 U. S. C. 641; and the Act of June 25, 1948, c. 645, 62 Stat. 749, 18 U. S. C. 1001. These provisions are reproduced in Appendix C (*infra*, pp. 52-53).

Statement of the Case

This case involves criminal prosecutions relating to the performance of four Government procurement contracts. These contracts, awarded in 1951 to Fabric Garment Co. Inc. ("Fabric"), a clothing manufacturer in Brooklyn, New York, provided for the manufacture of 450,000 so-called Eisenhower jackets out of wool serge material to be furnished by the New York Quartermaster Procurement Agency ("the Quartermaster") (R. 123-143, 690-697). The Quartermaster supplied Fabric with 709,159 yards of serge, the amount which Government allowance schedules specified for production of the requisite number of jackets (R. 563-564, 127, 132, 136, 195-196). Fabric produced and delivered 454,814 jackets, almost 5,000 more than the contracts provided (R. 564). Nonetheless, the Government contended that a surplus of some 46,000 yards of Government serge goods remained after completion of the contracts; that Fabric neither accounted for nor returned that alleged surplus; and that petitioners and other named defendants unlawfully sold approximately 19,000 yards of that surplus.

There were two indictments. The first (No. 144-185) charged that, in violation of 18 U. S. C. 1001 and 1002, Fabric, Joseph Abrams (its secretary) and Harold Hyman (its president) had made statements on Government forms falsely stating the inventories of surplus serge remaining after completion of the contracts and certifying that all goods furnished had been returned to the Government (R. 10-15). The second (No. 144-188) charged that, in violation of 18 U. S. C. 641 and 642, those defendants and the two petitioners here had unlawfully sold some 19,000 yards of such surplus serge to Alert Trading Corp. ("Alert") and David

Q. Hartman, who in turn were charged with its unlawful receipt; and that all the named defendants had conspired "to defraud the United States and to commit offenses against the United States, to wit, to violate Title 18, Sections 1001 and 641, United States Code" (R. 27-33).[1] The indictments were consolidated and tried to a jury.

The Government offered no direct evidence to support the gravamen of its case, that is, that from the Government serge furnished to Fabric under the contracts, a surplus remained after completion, was not returned to the Government, and was unlawfully sold to others. Nor was there any direct evidence to support its claim that the 19,000 yards of serge which were admittedly sold to Alert was part of the Government-furnished serge. Nor did the Government show that the two petitioners here either had knowledge, if such was the fact, that these 19,000 yards were Government goods or had knowledge that the allegedly false statements which Fabric allegedly filed with the Government were required to be or were actually filed. As to all these essentials, the evidence, such as it was, was indirect and circumstantial.

The cornerstone of the Government's proof was an accounting tabulation reflecting measurements derived from a "laboratory" experiment, the so-called "paper test". This test purported to measure the yardage of serge actually consumed in Fabric's manufacture of the jackets under the contracts.

In the actual process of manufacture in its plants, Fabric had received master patterns from the Quartermaster;

[1] Prior to trial, the District Court directed dismissal of the conspiracy count insofar as it charged a conspiracy to violate 18 U. S. C. 641 (see R. 39).

these had been commercially reproduced on cardboard; the cardboard reproductions had been used as guides in making "markers"; these "markers" had been laid on piles of fabric stacked 80 folds high ("lays"); and Fabric's cutters, following these "markers", had cut through the "lays" with a large electric knife, creating the myriad parts which were assembled into the many-sized jackets (R. 261-274, 284-294).

The "paper test", on the other hand, was conducted, as follows: A Government-employed military apparel designer reproduced the master patterns for each jacket size; from these reproductions, he blocked out the numerous jacket parts on paper; he then stapled these paper parts to three sheets of designer's paper; and, finally, with a hand shears, he carefully cut out all four thicknesses along the outlines of the patterns. At the same time he cut out one-yard squares of such designer's paper (R. 448-460). Each set of paper jacket parts and the yard squares of paper were then weighed, and a memorandum made of the weight of each set of the paper jacket parts and of the paper squares (R. 485-494). The factors obtained by dividing the weight of the paper parts for each size of jacket by the weight of the yard square were assumed to constitute the square yardage of serge fabric consumed in each jacket manufactured by fabric.[2]

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[2] The Government conducted two "paper tests". When preliminary examination by defense counsel revealed that in the course of the first test, conducted in 1953, several of the paper cut-outs had deviated from the master patterns, even though by but fractions of an inch, the test was abandoned as concededly worthless; whereupon, over defendants' objections, the Government was granted a three-day adjournment to conduct the new "paper test", the evidence as to which was subsequently admitted (R. 360-448).

There was also testimony as to a so-called "cloth test", which sought to calculate the yardage in sixty-three Eisenhower jackets

The Government sought to synthesize and summarize the findings derived from this "paper test" in its Exhibit 177, a large chart, approximately three feet long and almost a high, headed "Calculation of Shortage" (R. 536-543, 553-572).[3] The first line on this accounting tabulation lists the number of yards of serge which the Quartermaster furnished to Fabric under each of the four contracts and *in toto;* its second line, the number of completed jackets which Fabric delivered to the Quartermaster. As to these data, there was no dispute.

The other items in Exhibit 177 were, however, disputed. Those on the third line, designated "Yards of Serge 56" wide for jackets", were computed by multiplying the number of jackets delivered by the factors derived from the "paper test" (R. 539-543, 553-555). The items on the fourth line, purporting to show the yardage in the "clippings" or collected scrap returned to the Quartermaster, were computed by converting the weight of the "clippings" received by the Quartermaster into yards, on the assumption that each 18 ounces of "clippings" represented one yard of serge (R. 555-557). The fifth and last line of the chart, designated "Serge unaccounted for and not returned to QM in yards 56" wide", reflected a simple arithmetical computation:

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manufactured by Fabric by ripping each jacket apart and weighing the component parts. On cross-examination, the Government employee witness candidly admitted that the sixty-three jackets used were not an adequate sample of the nearly half-million jackets manufactured by Fabric; and, at the close of defendants' case, the trial judge told the jury to disregard this "cloth test" (R. 494-513, 653).

[3] Because Exhibit 177 was the keystone of the Government's case, we reproduce it for the Court's convenience in an appendix to this petition (Appendix D, *infra*, p. 54).

the sum of the items in the third and fourth lines subtracted from those shown in the first line (R. 557-559).

According to the "paper test" findings, as thus reflected in Exhibit 177, Government serge unaccounted for and not consumed in manufacture or returned by Fabric amounted in all to 46,451 yards—some six and one-half percent of the total yardage (709,159 yards) which the Quartermaster had furnished (R. 558-564).

As appears from the exhibit, it assumed that the only lawful uses to which Government-furnished serge conceivably could have been put were the two there designated: conversion into "Finished jackets delivered to QM" and conversion into "Clippings of Serge returned to QM. . . ." Such an assumption, however, disregarded and ignored other evidence of record, establishing that the serge had been put to additional uses equally guiltless so far as the defendants were concerned. Thus, there was testimony from Government witnesses that during the contract period (when Fabric's cutting room was working fifteen to sixteen hours a day and cutting from fifteen to eighteen thousand units per week), allowances had constantly to be made for defects; and, more significantly, that a great quantity of the "clippings" or scrap engendered by the cutting of the jacket parts from the 80-thick "lays" of fabric, instead of being shoved into the barrels provided at either end of the 100-foot long cutting table, fell on the floor and was ultimately discarded. The "clippings" which found their way into the barrel were returned to the Government and were accordingly credited to Fabric on Exhibit 177. Those which fell on the floor, however, were never reflected on Exhibit 177; they were swept up by the janitor and thrown out because "the Government does not permit you to take

anything off the floor",[4] or used to staunch a flood, to clean, test and oil machines, to make aprons, knee-pads, and seat-pads, and for stuffing leaking pipes; and the Government inspectors, who frequently visited the cutting room, raised no objection to such uses of the scrap material (R. 305, 307-310, 314-316, 328).

The alleged false statements made to the Government.

To support the eight false statement counts in the second indictment, the Government produced the inventory statements (Forms 201), purportedly signed by Abrams or Hyman or both, stating that but a small inventory of material, if any, remained on hand after completion of each contract; and the certificates (Forms 183), purportedly signed by Abrams or Hyman, certifying "that all materials furnished by the Government . . . have been returned . . . and/or transferred as authorized by" the Quartermaster (R. 158-236 *passim*, 718-734).

The evidence as to petitioners Berman and Mayflower.

This evidence relating to the "paper test" and to the form statements made to the Government did not involve the two petitioners here. For there was no evidence whatever that petitioners were employed by or otherwise inter-

[4] Such was the testimony of the Government witness Schneider, who had been in charge of Fabric's cutting room. Of vital significance in this connection is the evidence, newly discovered by defendants after the trial, which formed the basis of the motion for a new trial. This evidence (see *infra*, p. 12) demonstrated that Schneider was mistaken; that the floor sweepings of serge were actually collected, sorted and sold by Oliveri, Fabric's head shipping and receiving clerk, and his assistants. Defendants were quite unaware of this fact during the trial. But the Government had learned of it before the trial, had remained silent, and had in no way accounted for such sweepings in the accounting tabulation (Exhibit 177) it presented to court and jury as a complete accounting.

ested in Fabric or in Fabric's performance under the four contracts involved. The Government, however, elicited testimony concerning a sale made by petitioners, on Abrams' behalf, to Alert and Hartman, in July and August, 1951, involving approximately 19,000 yards of serge belonging to Abrams. No evidence was offered that these 19,000 yards were part of the Government serge furnished to Fabric. But a mill agent, one Cooper, was permitted to testify, over objection, that Hartman, in December, 1951, had offered to sell him serge at a price substantially lower than the market price; an F.B.I. agent testified that when he visited Mayflower's premises, in May, 1952, he had there found, on the floor, a piece goods ticket originally attached to a bolt of Government furnished serge; a trucker testified that he had seen petitioner Berman on several occasions in Fabric's premises; and the trucker further testified that when he carted the goods from Mayflower's premises to Alert's, he had observed, through tears in the corners of the wrappings, that the cloth looked the same as that from which "Eisenhower jackets are made" (R. 42-62, 74-76, 96-97, 105-117). There was also testimony that the F.B.I. agent, during the course of his investigation, had had some difficulty in locating Berman; that Berman had during that time spent 18 days in an Atlantic City hotel registered under the name "Berke"; that Mayflower had failed to pay rent on its premises and been dispossessed for nonpayment of rent in January, 1952; that Abrams, when, at his request, he had been given photostatic copies of the shipping tickets for the 19,000 yards of serge, had been "real mad about it"; and that Abrams had withdrawn a bank check for $15,000 from the Mayflower account in which the proceeds for the sale had been deposited and had exchanged it for the check of Abrams' Washington attor-

ney, which in turn had been used to pay for Abrams' purchases of oil well leases in Illinois (R. 63-65, 67-68, 69-74, 90-93, 98-99, 105, 149-152).

This was the full extent of the evidence in any wise relating the two petitioners here to the transactions in question.

On this aspect of the Government's case, the defendants called a number of witnesses to establish that Abrams had continually owned some 300 bolts of serge from 1946 to 1951; that such serge had been moved to the Mayflower premises in 1951; and that piece goods tickets removed from bolts of cloth furnished by the Quartermaster to Fabric but for which no storage space was available at Fabric's premises had been stored at the Mayflower premises in 1951 (R. 587-588, 590-591, 598, 600, 606, 608, 609, 616, 632).

The proceedings in the trial court.

The jury requested and was permitted to take the large accounting tabulation chart, Exhibit 177, into the jury room. At its request, also, the hearsay testimony of Cooper, the mill agent, was reread to it (R. 680-681). On April 13, 1957, the jury found each of the defendants, except Hartman and Alert, guilty on every count submitted to it; Hartman and Alert were acquitted. On June 4, 1947, judgments of conviction were entered on the verdicts (R. 746-758).

On August 5, 1957, the defendants jointly filed a motion for a new trial, under Rule 33 of the Federal Rules of Criminal Procedure, on the ground of newly discovered evidence. Affidavits submitted in support of this motion disclosed that, after the trial, the defendants had discovered that, unknown to them, certain of Fabric's employees had, dur-

ing 1951 and 1952, regularly been selling a very substantial yardage of the scrap sweepings derived from the Government-furnished serge; that this was so substantial in amount as to make it impossible that the 19,000 yards of cloth sold to Alert could have come from the serge furnished by the Government; that the scrap sweepings thus sold by Fabric's employees would account in large measure for the 46,000-yard deficiency which the Government charged against Fabric; that, before the trial, Fabric's employees had told the Government's agents and attorneys of such sales, but that the Government had neither investigated this evidentiary lead nor informed the defendants, the court or the jury of it; and that, to the contrary, in representing to court and jury the serge "unaccounted for" in its Exhibit 177, the Government had made no allowance whatever for the sweepings so disposed of by Fabric's employees. On November 22, 1957, without hearing, the trial judge denied the motion (R. 763-854, 916-922).

The proceedings in the Court of Appeals.

Appeals were thereupon taken to the United States Court of Appeals for the Second Circuit from the convictions and the order denying a new trial (R. 759-762, 923-926). On December 30, 1958, that court handed down its decision, reversing the convictions of Hyman on all counts charged and reversing the convictions of Fabric and Abrams on two of the eight counts charged in the first indictment (No. 144-185), but otherwise affirming the several judgments of conviction (Appendix B, *infra*, p. 50).

Refusing to heed the defendants' challenge to the validity and accuracy of the "paper test", the Court of Appeals held that the test had been rightly admitted and submitted

to the jury (id. 36), noting that although "forewarned of the method of this test, . . . [the defendants] offered no witness who disputed its basic validity" and finding "a high degree of similarity" between the conditions of the test and of the actual process of manufacture (*id.* 35, 37). The court found no error likewise in the admission of the Government's Exhibit 177, which it recognized "was a compilation of the evidence basic to the prosecution's calculations of the amount of serge furnished which was not returned" (*id.* 37-38). The court rejected the argument that the Government's reliance on this accounting tabulation brought into play the principles of *Holland* v. *United States*, 348 U. S. 121, stating that it saw "no occasion here for application of the *Holland* rules" (*id.* 40).

Conceding that the proof relating the 19,000 yards of serge sold Alert to the serge furnished by the Government was "[n]ot so strong", the court nevertheless found that "the totality of the evidence adequately supports the verdict" (*id.* 41). The only "evidence" to which it referred in this connection, however, was the testimony as to the discovery of the one piece-goods ticket on the Mayflower premises; the truckman's testimony that the serge sold "looked the same" as Government serge; and other evidence which, as the court said, the jury might have deemed "indicative of a consciousness of guilt on the part of Abrams and Berman" (*id.* 41). Again, with respect to the conspiracy count, the court pointed to no proof establishing knowledge by the two petitioners here of the filing of the allegedly false statements; it held, nevertheless, that "the evidence of collusion" in the sale of the 19,000 yards to Alert warranted an inference that petitioners had agreed with Abrams and Fabric to cause false statements to be made (*id.* 46).

Reasons for Granting the Writ

1. This Court's review is required initially by reason of the holding below that there was "no occasion here for application of the . . . rules" announced in *Holland* v. *United States*, 348 U. S. 121 (Appendix A, *infra*, p. 40) and that the trial court's disregard of those rules consequently afforded no cause for complaint.

We read *Holland* to impose rules of judicial administration governing not only net worth prosecutions but also other criminal cases where, as here, the proof of guilt lies in an accounting tabulation. For, as we understand it, *Holland* was but a particular application of rules generally applicable in criminal prosecutions. On such a reading, the decision below plainly conflicts with *Holland*.

If, on the other hand, *Holland* is to be read, as the court below reads it, as applicable solely to net worth prosecutions, this case presents an important federal question which has not been but should be settled by this Court. This question is whether a defendant in any criminal case where the proof of guilt is based on an accounting is entitled to protection equal to that accorded the accused in such a tax fraud prosecution.

The remarkable similarity of this case to the traditional net worth prosecution is readily apparent. As the court below recognized (Appendix A, *infra*, pp. 37-38), the cornerstone of the Government's edifice of guilt here was its Exhibit 177, the accounting tabulation derived from its "paper test". That accounting in fact was the *only* proof supporting the Government's theory of guilt: that a surplus of Government serge furnished to Fabric under its contracts remained after the contracts were completed and

was unlawfully diverted from the Government. Pretermitting questions as to the "paper test's" reliability and accuracy, the Government's proof in this case, as in the net worth prosecution, was reduced to a formula, the formula here being: (1) yardage of serge furnished by the Quartermaster to Fabric, *minus* (2) yardage of returned serge (a) in the form of finished jackets and (b) in the form of "clippings" or scrap, *equals* (3) the deficiency unaccounted for, not returned, and, *ergo*, unlawfully diverted. As in the net worth case, so here, the use of such a device "is so fraught with danger for the innocent that the courts must closely scrutinize its use". *Holland, supra,* at 125. Unfortunately, such scrutiny was woefully lacking in this case.

In the net worth prosecution, the Government asks court and jury to assume that an unexplained increase in net worth constitutes unreported taxable income. Here, the analogous assumption, likewise subject to "many weaknesses" (*Holland, supra,* at 127), is the equation of Government serge unaccounted for with Government serge unlawfully diverted. Here, too, "[t]here is great danger that the jury may assume that once the Government has established the figures in its . . . computations, the crime . . . . automatically follows"; a danger enhanced where, as with Exhibit 177, "the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; [for] bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." *Holland, supra,* at 127-128.

It was such perils to fair criminal prosecution which led this Court to admonish that "[w]hen the Government rests its case solely on the approximations and circumstan-

tial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt." *Holland, supra,* at 135. Yet it is just that burden which the courts below refused to impose on the Government in this case.

The Government made no attempt whatever to negate the obvious explanation for the difference its accounting formula disclosed between what Fabric received and what it returned—the normal loss and waste attendant on the conversion of almost three quarters of a million yards of serge into almost half a million jackets. Its own witness testified that such loss and waste did inevitably occur, and it had information readily available from which it could have shown how much serge was so consumed. Nevertheless, not only did the Government fail to offer such information to the jury; it invited and encouraged the jury to assume that the difference shown by its accounting was explicable solely by a finding of theft.

The Government's fault was compounded and rendered the more grievous by the fact that although it had admittedly learned, prior to the trial, that substantial quantities of sweepings of scrap serge had regularly been sold by Fabric's employees, it withheld such information from court and jury. Not only did it fail to explore this evidentiary lead, as the *Holland* rule requires; it *suppressed* the information, making no allowance whatever for this credit item in its accounting tabulation. And the trial court's refusal to grant a new trial on the basis of such evidence, newly discovered by the defendants only after the trial, put the stamp of judicial approval on this subversion of the judicial process.

Thus the Government and the trial court completely ignored the obligations imposed on them by *Holland*, and the Court of Appeals sanctioned such disregard.

The distinction which the court below suggests between the net worth cases and the instant prosecution is an unreal one. For it is of no moment that in the former the jury is asked to draw inferences of guilt from the defendant's course of "dealings *with his own property*", whereas "[h]ere the problem relates . . . *to property of the Government*, title to which, under an express provision of the contract, remained in the Government throughout the manufacturing process and which . . . [the contractors] were under a contractual duty to return in the form of finished articles or scrap" (Appendix A, *infra*, p. 39). The *statutory* duty of a taxpayer defendant to account for taxable income and to pay the tax thereon is of no lower rank than the *contractual* duty of a Government contractor to account for Government property furnished under the contract. The constitutional rights of the latter are obviously no less than those of the former. In either case, to permit an inference of guilt from accounting computations in which a full accounting of items, favorable as well as unfavorable, is lacking, "can only result in forcing the accused to prove his innocence" (*Massei* v. *United States*, 241 F. 2d 895, 905 (C. A. 1), modified and aff'd, 355 U. S. 595), and inevitably subverts the presumption of innocence basic in our criminal jurisprudence. It was to protect against just such a perversion of our judicial process that the safeguards in *Holland* were enunciated.

2. Not only has the court below betrayed an indifference to the obligations of the *Holland* doctrine; it has also

approved the admission of evidence, vital to the prosecution here, as to which petitioners have been denied the right of cross-examination. For, the "paper test", from which the Government's accounting was derived, was allowed to go to the jury without requiring first that some foundation be laid as to its validity, accuracy and reliability. Consequently, petitioners were deprived of that effective cross-examination which due process compels in a criminal case.

The Government proffered no expert testimony whatever as to the efficacy of the test as a procedure for the measurement of the yardage of serge consumed in the approximately half million jackets produced by Fabric. It is only in the Government's opening to the jury that one finds any description of the experiment as a whole (R. 40-42). The testimony as to the test is scattered throughout the record and deals only with the subsidiary work performed by various Government technicians, some of whom did not even know why they were asked to perform the operations they did perform (see, *e.g.*, R. 480-487). No witness appeared who had supervised the "laboratory" experiment as a whole; no witness could or did testify that the experiment had any validity. Thus, it was impossible at any point effectively to cross-examine on its validity; to challenge its many implicit assumptions; to ascertain the margins of error necessarily implicit in any laboratory test; to ascertain the extent to which the six and one-half percent serge deficiency disclosed by the test was statistically significant; to inquire into the similarity of the conditions of the test with those attending the actual process of manufacture; or to examine into the many other questions necessarily present when out-of-court experiments are introduced to

prove historical fact. And this with respect to a novel experimental procedure apparently never before or again used.

Conviction based on such experimental evidence without affording the accused an effective right of cross-examination as to validity is unquestionably a violation of due process. See *Carter Products* v. *Federal Trade Commission*, 201 F. 2d 446, judg. vacated with directions to enter new judg. based on opinion of Court of Appeals, 346 U. S. 327.[5]

3. The judgment of the Court of Appeals is one more application of a doctrine which, with increasing and disturbing frequency, has in recent years come to characterize the rulings of that court on criminal appeals. This is the doctrine that "the prosecution makes out a sufficient case to go to the jury, if the evidence would have been enough in a civil action; the only difference between the two . . . [being] that in the end the evidence must satisfy the jury beyond any reasonable doubt." *United States* v. *Costello*, 221 F. 2d 668, 671, aff'd. on other grds., 350 U. S. 359.

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[5] The prejudice to petitioners from the admission of the experimental evidence was aggravated by the manner of its presentation. Government Exhibit 177 equated (1) the *hypothetical* yardage required under the test's experimental conditions to cut out of *paper* the number of jackets delivered by Fabric to (2) the *actual* yardage of *fabric* used in the jackets delivered by Fabric. The experimental results were represented to court and jury as actual historical results. The influence of Exhibit 177 was enhanced when the jury was permitted to take the large chart into the jury room. In an age such as ours, when science is deified, only a juror of exceptional discernment and intelligence could appreciate that the pseudo-scientific "paper test" did not show the *actual* yardage of serge consumed in the *actual* process of manufacture, but merely the yardage covered by paper cut-outs made in a laboratory under conditions quite different from those hectic conditions which obtain in a manufacturing plant.

This Court has told us that in a criminal case the Government "must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty". *Holland* v. *United States, supra*, 348 U. S. at 138. Notwithstanding, and despite its recognition of the insufficiencies of proof on various elements of the crimes here charged, the court below affirmed the convictions because, as it put it, the "totality of the evidence" supported the jury's verdict (Appendix A, *infra*, p. 41).

The late Judge Frank, concerned that this doctrine and the narrow scope of appellate review it reflects conflict with the rulings of other circuits and have dangerous implications for the administration of criminal justice, repeatedly urged this Court to define the correct rule. *United States* v. *Costello, supra*, 221 F. 2d at 680 (concurring specially); *United States* v. *Castro*, 228 F. 2d 807, 808-810 (concurring specially), cert. den. 351 U. S. 940. Although this Court has heretofore refused to heed Judge Frank's urgent request for its intercession, we submit that review is now essential. For, so long as criminal appeals in the Second Circuit remain subject to the more restrictive rule there prevailing, the guilt of defendants in that circuit will continue to be measured by standards different from those governing appeals in other circuits.

In our judgment, the rule of the Second Circuit Court spells an abdication of the judicial function and a watering down of the reasonable doubt standard. In any event, uniformity in the determination of criminal appeals is obviously most desirable.

4. So far as the two petitioners here are concerned, the convictions affirmed below were secured by highly prejudicial and patently inadmissible evidence and, in any event,

evidence which cannot support the findings of guilt returned against them.

a. The prejudicial and inadmissible evidence to which we refer was that of Cooper, the mill agent, relating to his conversation with Hartman, in December, 1951, concerning large amounts of wool serge then available at a price less than the prevailing market price (R. 42-49). This highly prejudicial testimony was received, despite petitioners' strenuous objections, "subject to connection" as to petitioners (R. 44). But it never was connected. See *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (C. A. 2). Its admissibility depended on proving that Hartman, at the time he spoke to Cooper, was a member of a conspiracy with petitioners and that the conversation was in furtherance of such conspiracy. The only evidence offered concerning Hartman, however, was an F. B. I. agent's testimony that Hartman had given him certain records and made certain statements to him during the course of the subsequent F. B. I. investigation, after termination of the alleged conspiracy. It is, of course, well established that statements of an alleged co-conspirator to an investigating officer are never competent as against the alleged co-conspirators to prove the speaker's adherence to the claimed conspiracy. *Fiswick* v. *United States*, 329 U. S. 211; *United States* v. *Ah Kee Eng, supra.*

It is no justification for admission of such prejudicial testimony to say, as the court below does, that "there is nothing to show that the jury gave the evidence improper application" (Appendix A, *infra*, p. 42). The importance which the jury attached to the testimony is evident from the fact that this was the only testimony it specifically requested be reread to it (R. 680). Thus, the jury was allowed to hear these hearsay declarations not once but

twice; and the verdicts of petitioners' guilt on the basis of such testimony is eloquent proof of the "improper application" accorded it by the jury. This Court has held, even where evidence of guilt was far stronger than in this case, that such error requires reversal of convictions predicated on such inadmissible proof. *Krulewitch* v. *United States*, 336 U. S. 440, 442-443; *Lutwak* v. *United States*, 344 U. S. 604, 617-618, 619. "Prior cases in this Court have repeatedly warned that . . . [it] will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U. S. 391, 404.

b. The convictions of petitioners were built on inference piled upon inference, presumption upon presumption. Having, by its accounting tabulation, purported to prove a discrepancy between the Government serge delivered to Fabric and that ultimately returned in one form or another, the Government asked the jury to infer and the jury did infer that the discrepancy represented serge stolen by the defendants. Seizing upon the fortuitous circumstance of a somewhat contemporaneous sale by the two petitioners here of some serge belonging to Abrams, the jury was invited to and did infer that that serge sold was part of that which the jury previously inferred had been stolen. This, though there was no evidence that such was the fact. Beyond this, although nothing in the record showed knowledge, the jury was further asked to and did infer, from the inferences already made, that petitioners *knew* that the serge so sold had belonged to the Government; and in order to convict petitioners also of the conspiracy charged, the jury was asked to and did infer that they had sold this serge as part of a conspiracy to defraud the United States by filing false statements, although there was nothing in

the record whatever to show that petitioners had the slightest knowledge that such statements were required to be made or were ever filed with the Government. Of such weak threads were the cases against the two petitioners here woven.

As the Court aptly stated in *Sapir* v. *United States*, 216 F. 2d 722, 724 (C. A. 10), aff'd in part and vacated in part, 348 U. S. 373:

> "It is well settled that an inference cannot be predicated upon another inference. Presumption cannot be superimposed upon presumption to reach a factual conclusion."

See, also, *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U. S. 472, 477; *United States* v. *Ross*, 92 U. S. 281, 283. Yet there can be not the slightest question but that such was the flimsy fabric of the cases against our two petitioners.

5. The Court below erred further in rejecting petitioners' challenge to the venue laid as to the conspiracy count in the second indictment. "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed." *United States* v. *Johnson*, 323 U. S. 273, 276; *United States* v. *Provoo*, 215 F. 2d. 531, 537, 539 (C. A. 2).

The places of business of Abrams, Fabric, Berman and Mayflower during the period in question were all in Brooklyn, in the Eastern District of New York. The four contracts here involved were all performed there. There was no proof whatever as to where the allegedly false statements, the subject matter of the conspiracy count, were signed, or where they were turned over to the Government,

or by whom, or how (see R. 183-184). Every reasonable inference supported the conclusion that these statements were delivered to a representative of the Quartermaster in Brooklyn. The court below is mistaken when it states that the "proofs showed that these statements were to be submitted to the 'Contracting Officer' whose office was . . . in the Southern District of New York . . ." (Appendix A, *infra*, p. 46). For nothing in Fabric's contracts required that the statements be submitted in any particular place; the contracts required only that they be submitted to the "Contracting Officer," who was not identified with any particular locale, and which term, moreover, was broadly defined to embrace all the authorized representatives of such officer (see R. 690, 691, 692, 694, 695, 697). And, as already indicated, there was no evidence as to where, in fact, the statements were actually delivered to the Government's officers.

Nor is the court below correct in holding that the objection as to venue was waived (Appendix A, *infra*, p. 46). For this issue was raised even before trial in the defendants' motion for a bill of particulars, as the trial court's opinion on that motion discloses (SR. 2); the defendants made clear they were contesting venue when they elicited evidence to lay a foundation for such a challenge (R. 227-228); they again raised the point on their motion to acquit after the Government rested its case (SR. 7-12); and the matter formed one of the subjects of the trial court's charge to the jury at the close of the case (R. 664-665).

6. In affirming the trial court's denial of the motion for a new trial based on evidence newly discovered by the defendants after the close of the trial, the court below

evidences a grievous indifference to the principle that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done". *Berger* v. *United States*, 295 U. S. 78, 88.

The newly discovered evidence, as we have indicated, demonstrated that during the very period when the Government charged that the defendants were unlawfully selling surplus Government furnished serge, certain of Fabric's employees, unknown to the defendants, were selling such serge in the form of scrap sweepings. Had such evidence been offered to the jury, it might effectively have proven the defendants' innocence. The Government had been advised of this evidence *prior to the trial*, but never once did it call it to the attention of court or jury. Beyond this, in the accounting tabulation on which its case rested and which it advanced to court and jury as a full accounting, the Government omitted any consideration of these facts.

Hazel-Atlas Co. v. *Hartford Co.*, 322 U. S. 238, teaches that in such circumstances the defendants at the very least were entitled to a new trial. Nor is it any answer to say, as did the courts below, that the defendants may have been less than diligent in their discovery of the fraud thus visited by the Government on court and jury. For,

> ". . . [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of

litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud" (322 U. S., at 246).

Certainly there is no matter of greater moment to the public than the administration of justice in the criminal courts.

Conclusion:

We are mindful of the limited extent to which this Court sits in review on judgments of our lower courts. We should, therefore, be reluctant to seek review here were it not that this case involves so radical a disregard of the principles which should govern the administration of criminal justice in our Federal system.

In affirming petitioners' convictions, the court below has sanctioned practices which so conflict with the rulings of this Court and represent so radical a departure from the accepted and usual course of criminal proceedings in our Federal courts, that review by this Court and the exercise of its powers of supervision are urgently required.

For the reasons herein set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MILTON C. WEISMAN
HARRY I. RAND
Attorneys for Petitioners

WEISMAN, CELLER, ALLAN, SPETT & SHEINBERG
of Counsel

February, 1959.

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 288-289—October Term, 1957.

(Argued June 12, 1958 Decided December 30, 1958.)

Docket Nos. 24732-24733

UNITED STATES OF AMERICA,

Appellee,

—v.—

FABRIC GARMENT CO., INC., JOSEPH ABRAMS, and HAROLD HYMAN,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FABRIC GARMENT CO., INC., MAYFLOWER MANUFACTURING CORP., JOSEPH ABRAMS, HAROLD HYMAN, and MURRAY BERMAN,

Defendants-Appellants,

—and—

ALERT TRADING CORP., and DAVID Q. HARTMAN,

Defendants.

Before:

HINCKS and WATERMAN, *Circuit Judges*, and RYAN, *District Judge.*

Appendix A—Opinion of Court of Appeals

Appeals from judgments and orders of the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

Fabric Garment Co., Inc., Joseph Abrams, Harold Hyman, Mayflower Manufacturing Corp., and Murray Berman appeal from their convictions on an indictment charging unlawful sales of Government-owned wool being made into Army jackets, in violation of 18 U. S. C. §641, and conspiracy in violation of 18 U. S. C. §371 to violate 18 U. S. C. §1001. Fabric Garment Co., Abrams and Hyman also appeal from their convictions on a companion indictment charging the making of false statements in violation of 18 U. S. C. §1001. All appellants appeal from orders denying their respective motions for new trials. As to the appellant Hyman, the convictions under both indictments are reversed and the case remanded with a direction to dismiss. As to all other appellants the convictions are affirmed except that as to Fabric Garment Co. and Abrams the convictions on Counts VI and VIII of Indictment 144-185 are reversed and remanded for new trial.

Simon H. Rifkind, of Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y. (Paul, Weiss, Rifkind, Wharton & Garrison, Edward N. Costikyan, and Frederick S. Wyle, New York, N. Y., on the brief), *for Fabric Garment Co., Inc., and Joseph Abrams.*

Milton C. Weisman and Cecile H. Goetz, both of Weisman, Celler, Allan, Spett & Sheinberg, New York, N. Y. (Weisman, Celler, Allan, Spett & Sheinberg, and Ralph J.

Schwarz, Jr., New York, N. Y., on the brief), *for Mayflower Manufacturing Corp., Murray Berman and Harold Hyman.*

ALAN W. RICHENAKER and ROBERT B. FISKE, JR., Asst. U. S. Attorneys for the Southern District of New York, New York, N. Y. (Paul W. Williams, U. S. Attorney, and Charles H. Miller, Asst. U. S. Attorney, S. D. N. Y., New York, N. Y., on the brief), *for the United States.*

HINCKS, *Circuit Judge*:

This appeal grows out of two indictments which were consolidated for purposes of trial and appeal. One had been returned against Abrams, Hyman and Fabric Garment Co., Inc., plus Mayflower Manufacturing Corp., Berman, Alert Trading Corp. and Hartman, charging (1) the unlawful sale of approximately 19,000 yards of Government-owned wool serge, in violation of 18 U. S. C. §641, and (2) a conspiracy to defraud the United States and to violate 18 U. S. C. §1001.* The other indictment charged violation of 18 U. S. C. §1001, and contained eight counts charging Abrams, Hyman and Fabric Garment Co., Inc., with the making of eight separate false statements about the disposition of wool serge furnished to the Fabric Garment Co. by the New York Quartermaster Procurement Agency under four contracts to make jackets for the United States Army.** After a trial to a jury, Alert Trading Corp. and Hartman were acquitted; the other defendants

* Indictment C 144-188.

** Indictment C 144-185.

were convicted. From these convictions and from the denial of a motion for a new trial, the convicted defendants appeal.

Both indictments grew out of four successive contracts which the New York Quartermaster Procurement Agency, in 1951, entered into with the defendant Fabric Garment Company (Fabric), under which Fabric was to manufacture, in the aggregate, 450,000 Eisenhower jackets for the Army out of 18 ounce olive drab wool serge to be furnished by the Procurement Agency. The contracts provided that unless otherwise directed by the contracting officer, on the completion of each contract Fabric should return all surplus property and scrap "not returned in form of acceptable articles." It was further required by each contract that on QM Form 183 Fabric should certify that "all property furnished by the government * * * has been returned * * * in the form of finished articles, full pieces, short pieces, remnants, clippings containing wool * * *" subject to "the penalty imposed by Section 1001 of Title 18, U. S. C. A. of the Criminal Code for so certifying falsely." And on Form 201 Fabric was to certify the amount of surplus Government furnished property "on hand" at the completion of the contract.

The Agency supplied over 709,000 yards to Fabric for the manufacture of jackets, delivering this material to Fabric's cutting room first at 473 Liberty Street, and later to Knickerbocker Ave., both of Brooklyn, where it was stored pending processing. Fabric returned 454,814 finished jackets plus 89,238 pounds of wool scrap.* The specified

* The prosecution offered credible evidence that this 89,238 lbs. of scrap was equivalent to 79,322 yards of the 56" serge which had been furnished.

Government forms, two for each contract, were certified by Fabric purportedly over the signatures of Abrams and Hyman or both at the completion of each contract. The foregoing facts were not contradicted.

The appellants now contend that the evidence was insufficient to support the yerdicts. At the trial the prosecutor, to prove the charge of an illegal sale of wool, offered evidence which if accepted established the following facts. Abrams, officially the secretary of Fabric, was its "boss." Berman was the proprietor and operator of Mayflower Manufacturing Corp. (Mayflower) and a close associate and assistant of Abrams in the operation of Fabric. In January 1951, Berman rented premises for Mayflower for the storage of cloth, at 450 Liberty St., Brooklyn, a block away from Fabric's plant. In July 1951, after Fabric had received the wool serge under the first two Government contract, Abrams told a trucker, whom he had frequently employed to carry the Government serge to and from the place it was cut, to pick up 30 pieces of goods at Mayflower and truck it to Alert. The trucker received these pieces from Berman at the Mayflower premises and in the transfer the brown paper wrapping on certain pieces was broken disclosing serge which the trucker testified as the "same" and "looked the same" as the Government serge which at Fabric's behest he frequently transferred for cutting. Other such deliveries to Alert were made in July and August, 1951, some of which were confirmed by trucking tickets. In all, some 19,000 yards were sold to Alert as was proved by Mayflower's invoices and Alert's checks.

There was uncontradicted evidence that in July and August, 1951, the checks in payment of the sales to Alert

were deposited in the Mayflower bank account; that shortly thereafter Abrams caused $15,000 to be withdrawn for his personal use by devious devices whereby a bank check on Mayflower was exchanged for the check of Abrams' personal attorney in Washington, D. C., which in turn was used to pay for Abrams' purchases of oil well leases in Illinois. Moreover, Abrams made an unsuccessful attempt to obtain from the trucker possession of the trucking tickets which evidenced the transfer of the piece goods from Mayflower to Alert. And after the Government investigation began in December, 1951, Berman fled, remained in hiding under an assumed name for several months and discontinued the payment of rent for the Mayflower premises.

There was other evidence to identify the serge sold to Alert as that furnished by the Government to Fabric. The Government investigators found in the Mayflower premises, whence the delivery to Alert had been made, a piece goods ticket which had been attached to a piece of serge furnished to Fabric under its first contract for the Eisenhower jackets. Moreover, there was evidence of a "paper test" made at the instance of the prosecution which was offered to show that the linear yardage of serge, in pieces 56" wide, which went into the finished jackets plus that of the scrap returned was 46,451 yards less than the yardage furnished for all four contracts and 30,000 less than the 425,876 yards which had been furnished on the first two contracts before the sale from Mayflower to Alert had been made. Thus according to this test, Fabric should have had on hand more surplus serge than that delivered to Alert. To be sure, the validity of the test and the accuracy of its indications were challenged by the defense and

the admission of its results is now assigned as error. We now proceed, therefore, to give the test detailed consideration.

The primary purpose of the paper test was to ascertain the square yardage of the wool serge used in the completed jackets. The scheme of the test was suggested by the method of manufacture which was as follows. From copies of the master linen-paper patterns of all sizes of the jackets provided by the Quartermaster Corps, Fabric caused working patterns to be cut on heavy paper cardboard from which thin paper "markers" were traced. These were superimposed upon "lays" of the wool serge which comprised lengths of 80-layer thickness. The serge was then cut by an electric knife along the pattern of the marker. There were twenty-five separate irregularly shaped pieces of serge in each completed jacket and the contracts called for jackets of thirty different sizes.

The prosecution's paper test followed this basic scheme. A set of the twenty-five patterns for each size jacket was reproduced in heavy paper from the master pattern. This set of patterns, after conditioning, was weighed and the weight compared with that of a square yard of the same paper similarly conditioned, thereby establishing a ratio of area to weight from which was computed the square yardage of the aggregate pieces of serge going into one jacket of each size. This figure, expressed in square yards, by simple mathematical computation was translated into linear yardage of 18 ounce wool in pieces 56" wide.

There was detailed testimony as to the manner in which the test had been carried out. Mr. Strykower, the military

apparel designer of the Philadelphia Quartermaster Depot, testified that the master patterns for Eisenhower jackets, copies of which were sent to Fabric for the performance of the contracts, were in his custody; that pursuant to instructions, he cut out in designer's pattern paper exact duplicates of the master patterns in use at the time of the Fabric contracts; and that he turned these paper parts over to Mr. Bordonaro, head of the physical testing section of the paper and paper products at the Philadelphia Depot. Mr. Bordonaro testified to the conditioning and weighing of the paper parts. And finally, Mr. Good testified to the conversion of weight into yards and to the computation of the yards of wool, which by analogy the prosecution argued had gone into the completed jackets.

Although forewarned of the method of this test, the appellants offered no witness who disputed its basic validity. They did, however, question its accuracy urging that apart from any questions as to its probative value on the issue as to the amount of serge which was returned to the Government in the form of finished jackets, the test was not admissible to prove the amount of serge which Fabric should have had on hand at the completion of the contract. This is so, they say, because there was evidence that in the manufacturing process lengths of selvage were used to tie bundles of cut parts together; that scrap serge fell from the cutting tables to the floor and was swept up and disposed of; that other scrap was used for kneepads, plugging leaky steam pipes and cleaning machines; that pieces of the serge were excised as defective; and that in fitting together the several parts of a jacket for stitching there was some trimming which resulted in clippings which were

swept up and disposed of. The prosecution, however, disputed and minimized such evidence by pointing out that no written dispensation was shown for the plain provisions of the contracts for the return of all scrap; that the contractor was not charged with the selvage; that a substantial allowance for defective pieces had been included in the amount of fabric charged against the contractor and, moreover, any piece excised as defective could and should have been returned as scrap; and that the scheme of the paper test was such that the trimmings were included in the area of serge included in the finished jackets and in that form had been duly credited to the contractor. These conflicting contentions were fairly submitted to the jury.*

We hold that the paper test was rightly admitted and submitted to the jury. The ruling lay within the discretion

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* As to this the judge charged:

"In that respect we get into this paper test. The Government claims that the records show the gross yardage sent to the contractor, to Fabric Garment Co., Inc.; that the paper test shows how many yards went into these garments, and that by the weight of the scrap returned they can compute the equivalent in yardage, and they claim that when that is all done there is a shortage, I think, of about 46,000 yards.

"The defendants claim that the records as to serge show gross yards, and they have explained the deductions they think should be taken from gross yardage, as to defects and so forth. They say the paper test was an unscientific test. They say you cannot compute yardage from the weight of the scrap returned because of the unscientific manner in which that was done, and they say there has been no paper allowance for waste and sweepings.

"That is the broad outline of the controversy, and as to these charges, without suggesting that one thing is more important than another, that has been, in point of time consumed, perhaps the principal issue underlying this controversy * * *"

of the judge. *United States* v. *Ball*, 163 U. S. 662, 673. We think his discretion was wisely exercised. The problem was one for the determination of area—the aggregate area in square yards of the congeries of separate, highly irregularly-shaped serge parts that went into a jacket. The solution reached depended upon a ratio or proportion; and both factors of that proportion were expressed in the weights of designer's detail paper taken from the same roll and similarly conditioned overnight. There was a corresponding similarity in the process of manufacture: the "lays" were made and the pieces cut from rolls of serge stored in the same room under the same conditions of temperature and humidity. Thus the conditions of the test had a high degree of similarity to the process of manufacture which gave the ratio thus established substantial accuracy as a means to measure the area, in terms of yardage, of the serge going into a jacket. The test provided a method for the determination of area which would be helpful to the jury in determining how much of serge furnished was left in Fabric's hands after the jackets had been delivered. It was admissible under the rule of *Lever Bros. Co.* v. *Atlas Assur. Co.*, 7 Cir., 131 F. 2d 770, which also was concerned with determination of a method of measurement. Its validity depended upon measurable quantities which gave it even more reliability than such tests as were involved in *Lobel* v. *American Airlines*, 2 Cir., 205 F. 2d 927, and other cases such as *American Tobacco Co.* v. *United States*, 6 Cir., 147 F. 2d 93, 119, aff'd 328 U. S. 781, and *Gaillard* v. *Boynton*, 1 Cir., 70 F. 2d 552. And we find no error in the receipt in evidence of Government Exhibit 177 which was a compilation of the evidence basic to the pros-

ecution's calculations of the amount of serge furnished which was not returned. *United States* v. *Schenck*, 2 Cir., 126 F. 2d 702, cert. denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; *United States* v. *Samuel Dunkel Co.*, 2 Cir., 184 F. 2d 894, 898, cert. denied 340 U. S. 930; *United States* v. *O'Connor*, 2 Cir., 237 F. 2d 466. And see *United States* v. *Johnson*, 319 U. S. 503, 519; *Kemler* v. *United States*, 1 Cir., 133 F. 2d 235, 240; IV Wigmore on Evidence, 3d Ed., §1230.

We do not overlook the appellants' interesting and ingenious argument that resort by the Government to the paper test necessarily brought into play the principles of the net worth tax evasion cases. Claim is made that the prosecution failed to comply with the safeguards laid down for such prosecutions in *Holland* v. *United States*, 348 U. S. 121. The theory is that here, as in a net worth tax evasion case, the prosecution's case depends on an accounting as to which the burden is on the prosecution to prove all credits to which the defendants are entitled as well as the debit items charged against them. And so they contend that the burden was on the Government to prove the amount of wool which permissibly (as they assert) went into scrap but was never returned or accounted for. We see, however, no valid analogy with net worth cases.* For in such

* Naturally, the information of the prosecution in a net worth case as to the existence and amount of assets includable in a defendant's opening net worth statement lacks both the specificity and the authenticity of the prosecution's information as to the amount of Government wool which was actually entrusted to a contractor for manufacture. Moreover, under the net worth theory the Government's case depends upon an opening net worth statement which generally goes back to a time long before the taxpayer was on notice of any need to keep an

cases the problem relates to the inferences which may be drawn from changes in a defendant's net worth resulting from dealings *with his own property* to which, of course, the Government had neither title nor right to possession. Here the problem relates not to appellants' property but *to property of the Government*, title to which, under an express provision of the contract, remained in the Government throughout the manufacturing process and which appellants were under a contractual duty to return in the form of finished articles or scrap.

The appellants make much of the contract provision whereby the duty to return remains in force "unless otherwise directed by the Contracting Officer." But we agree with counsel for the Government that the contractual condition just quoted relative to a contrary direction by the Contracting Officer was one by way of condition subsequent. Consequently, if the appellants relied upon the condition, it was for them to come forward with some evidence that the Contracting Officer had indeed "otherwise directed." *Javierre v. Central Altagracia*, 217 U. S. 502; *Davies Flying Service v. United States*, 216 F. 2d 104. See also *McKelvey* v. *United States*, 260 U. S. 353; *United States* v. *Krepper*, 3 Cir., 159 F. 2d 958, cert. denied 330 U. S. 824. Of such evidence there was none. It is true that the appellants point hopefully to the testimony of one of Fabric's employees who when called by the Government reported the Government inspector assigned to these con-

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accurate tabulation of his assets. In the instant case, however, the contractor was on notice from the time the contract was signed that he would be required to certify, under pain of the penalty imposed by §1001, the amount of serge not returned to the Government at the completion of the contract.

tracts as saying that "any clippings, * * * that would fall off the table and hit the floor, you are not allowed to send back to the Government." But it is scarcely sensible to construe the quoted statement as conclusively establishing an exception authorized *by the Contracting Officer* to the contractual provision calling for the return of all scrap, especially in view of a contractual provision that "[D]irections of the Contracting Officer and communications of the contractor issued pursuant to this clause shall be in writing." Certainly the jury was not required to accept this testimony as sufficient to establish an authorized disposition of the scrap otherwise than by return to the Government. At most, it created a factual issue which the jury by its verdict resolved against the defendants. We see no occasion here for application of the *Holland* rules.

At trial another line of defense to the charge of an unlawful sale was advanced. The appellants called witnesses who testified in some detail that Abrams in 1946 had bought some 20,000 yards of 18 ounce olive drab wool serge at $2.75 per yard which a friend had stored for him without charge for some four years. Despite the size of this alleged transaction, there was no documentary evidence either of its consummation, of the carrying charges throughout the subsequent years such as insurance, or of inventory reports. Abrams' friend testified that in the middle, or possibly the spring, of 1951 [which was after Fabric had received the Government serge on the first two contracts], he delivered this serge in numerous successive shipments as requested by Abrams, to Mayflower.

It seems to us beyond argument that there was ample proof of a sale to Alert in July and August 1951 of some 19,000 yards of serge made nominally in Mayflower's name but actually at the instance of Abrams with the active assistance of Berman. Not so strong, perhaps, was the proof that the subject-matter of the sale was Government-owned serge. But on this issue also, which lies at the heart of the controversy, we are satisfied that, except as to Hyman, the totality of the evidence adequately supports the verdict. *United States* v. *Pugliese*, 2 Cir., 153 F. 2d 497. Certainly it lay within the province of the jury to reject as incredible the defense testimony of a personal investment in wool serge by Abrams which he had carried until its sale to Alert five years later. The jury may well have considered this shallow explanation entirely false and fabricated and as indicative of a consciousness of guilt on the part of Abrams and Berman. *United States* v. *Von Clemm*, 2 Cir., 136 F. 2d 968, cert. denied 320 U. S. 769; *Di Carlo* v. *United States*, 2 Cir., 6 F. 2d 364, cert. denied 268 U. S. 706; *Hodgskin* v. *United States*, 2 Cir., 279 F. 85, 93. Especially telling was the devious method used by Abrams to siphon $15,000 out of Mayflower's treasury after Alert had paid Mayflower for its purchase of serge. The verdict did not rest on hearsay declarations made by Hartman, of the Alert Trading Co., as appellants suggest. Documentary evidence was received which showed that payments by Alert of charges on Mayflower invoices were covered into the Mayflower bank account from which Abrams' circuitous withdrawals were fully proved by competent evidence.

The appellants further claim that because the jury ultimately acquitted Hartman of conspiracy with the appel-

lants, Hartman's acts and declarations, as testified to by Government witnesses Cooper and Agent Mulderig, were inadmissible against the appellants. The law, however, is otherwise. There was evidence in the record relating to Hartman's relationship to the appellants which justified the admission of this testimony. *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 230-1, aff'd 341 U. S. 494; *United States* v. *Pugliese, supra; Kamamosuke Yuge* v. *United States*, 9 Cir., 127 F. 2d 683, cert. denied *sub nom. Mateus* v. *United States*, 317 U. S. 648. Of course it does not follow that the evidence of Hartman's declarations because it was properly admitted might be used against other defendants absent a finding that Hartman was a co-conspirator or a partner in a common criminal enterprise. But there is nothing to show that the jury gave the evidence improper application. At the time this testimony was received, the jury was properly cautioned as to the effect of the declaration. And there was no request for a repetition of this caution in the charge.

As to Hyman, however, a different result is required. It is true that he was titular president of Fabric and a signature purportedly his appears on some of the contracts and the government forms. There was vague testimony that his position in Fabric was that, roughly, a factory superintendent. But there was no direct evidence that he knowingly assisted in the sale of Government wool to Alert or participated in the proceeds and no evidence of his activities from which such participation should be inferred. As to him there was no evidence of consciousness of guilt. For lack of evidence, we hold that his conviction should be set aside and that the charges pending against him under both indictments be dismissed.

We will now assess the sufficiency of the evidence to support the eight counts of the companion indictment charging the making of false statements in violation of 18 U. S. C. §1001. The verdicts on these eight counts necessarily import findings that the defendants Fabric, Abrams and Hyman knowingly made, or caused to be made, two false certificates with respect to each of the four contracts. As to Hyman, these findings are unsupported by evidence sufficient to establish his knowledge of their falsity. We therefore shall focus our scrutiny on the evidence against Fabric and Abrams.

It is urged in behalf of Abrams that as to the four certificates which the Government alleges bear his signature (those charged in Counts I, II, III and VII of the indictment) there was no evidence which authenticated his signature as genuine. It is true that there was no direct authenticating testimony. However, in addition to these certificates there were in evidence several other documents which were alleged to bear Abrams' signature. Thus the signature page of the original contract, QM 12372, contained a certificate purportedly showing Abrams' signature which compared with his signature on a "Request for Signatures" which the Procurement Agency had previously sent to and received back from Fabric complete with the requested signatures. Although Abrams' signature on none of these documents had been directly identified by a qualified witness, we think it was permissible under the evidence of the dealings between the Government and Fabric and Abrams to infer the authenticity of these documents and to conclude that the Abrams' purported signatures on the certificates were indeed his. *Hupman* v. *United States*, 6 Cir., 219 F. 2d

243, 247, cert. denied 349 U. S. 953. The jury may well have thought this circumstantial evidence all the more convincing because of the fact that it stood uncontradicted by any evidence to dispute the authenticity of Abrams' signatures on the certificates.

However, to hold Abrams on those certificates it was not necessary for the Government to prove, even circumstantially that the certificates each actually bore a signature made by his hand. From the many facts in evidence showing Abrams' dominance in the Fabric enterprise and his participation in the sale to Alert, the jury might reasonably have inferred that even if his signature had been placed on some of the certificates by a subordinate and even if on other certificates his signature did not appear at all, he himself had caused the certificates to be made and was criminally responsible as an accessory under 18 U. S. C. §2 for all those certificates which were proved to be false.

But Abrams and Fabric further assail the false statement convictions for lack of evidence to show that the certificates were false or known by them to be false. As to the four certificates relating to the first two contracts, this attack is clearly unfounded. The evidence which we held sufficient to sustain the finding of the illegal sale of Government-owned wool by Abrams to Alert is equally sufficient to support findings that to their knowledge all the serge furnished on the first two contracts had *not* been returned or transferred with authority, as certified, and that to their knowledge the surplus inventory had been falsely certified.

The case is not so strong as to the two "Return of Inventory" (Form 201) certificates relating to the last two

contracts: there is no evidence that any particular illegal sales had been made from material furnished under these two contracts. Nevertheless, the evidence based on the paper test showed such great disparity between the material concededly furnished and that which was returned that, if the test were accepted by the jury as it might properly have been, the jury might properly conclude that there was an unreported shortage of such substantial magnitude that Fabric and Abrams must have known that these two certificates also were false.

But as to the two "Return of Property" (Form 183) certificates covering the last two contracts we agree that there was a vital failure of proof. These two certificates recited that the property furnished had been returned "and/or transferred as authorized" by the Procurement Agency. This alternative disposition was not stated as an exception or a condition subsequent to the provision for return. To prove the certificate false, it was incumbent on the Government to prove that surplus material had neither been returned nor transferred as authorized. And we find no proof of an absence of authorized transfer. Thus although we see no valid reason to disturb the verdicts against Fabric and Abrams on Counts V and VII as well as Counts I to IV, inclusive, the convictions of Fabric and Abrams on Counts VI and VIII must be reversed and the cases remanded for new trial on said counts if the United States so elects.

The appellants also question the sufficiency of the evidence to support the conspiracy count (Count III of Indictment 144-188). As noted above, as to Hyman we agree that the evidence was insufficient. But as to the other

appellants we hold the evidence was ample. As to them, the evidence of collusion in the sale of Government-owned wool to Alert, to mention one of the numerous items of relevant proof, warranted an inference that they had agreed to cause false statements to be made in violation of 18 U. S. C. §1001. Otherwise, they could not hope to conceal their crime.

In addition to the foregoing contentions, numerous other claims of error are pressed upon us by the appellants. They charge that venue both of the false statement counts and of the conspiracy count was improperly laid in the Southern District of New York. It is unnecessary to pass on the merit of this contention. For the venue was not questioned until after the Government had completed its case. The objection therefore was waived. *United States* v. *Miller*, 2 Cir., 246 F. 2d 486, rehearing on other points denied, 248 F. 2d 163, cert. denied 355 U. S. 905; *United States* v. *Spagnuolo*, 2 Cir., 168 F. 2d 768, cert. denied 335 U. S. 824; *Hagner* v. *United States*, D. C. Cir., 54 F. 2d 446, aff'd 285 U. S. 427. But even if the objection to venue had not been waived, we should sustain the venue. The overt acts alleged in the conspiracy count were the filings, in the Southern District of New York, of the false statements with respect to the four Government contracts. The proofs showed that these statements were to be submitted to the "Contracting Officer" whose office was with the New York Procurement Agency at 111 E. 16th, New York City, in the Southern District of New York, and that the completed forms were found there in the files of that agency. This was enough to sustain the challenged venue in the Southern District. *DeRosier* v. *United States*, 5 Cir., 218 F. 2d 420.

cert. denied 349 U. S. 921, and *United States* v. *Miller, supra.* Even if the completed forms had been dispatched from Brooklyn, the crimes charged were completed when the statements became a part of the Agency files in Manhattan. Cf. *United States* v. *Miller, supra.*

After passing a few scattered claims of error which we find without substance and overrule without discussion, we now come to the appellants' vigorous assertion of error in denying their motion for new trial. The motion was based in part on evidence allegedly newly discovered and in part on a cognate contention that the newly discovered evidence had been improperly suppressed by the prosecution.

The evidence derived from one Oliveri, an employee of Fabric, who stated that throughout the performance of the contracts he with the help of fellow employees had daily sold an undefined amount of wool scrap to junk dealers, and that he had not revealed this practice to the appellants until after their conviction. However, although the appellants had been forewarned of the trend of the Government's proofs, their motion was supported by no showing that the appellants, by seasonable inquiries of Oliveri and the other employees, could not have learned of this disposition of the wool scrap before trial.

The claim of wrongful suppression rested upon the conceded fact that prior to trial Oliveri in an interview with the prosecuting attorney and an FBI agent informed them that in the course of the performance of the contracts he had been selling scrap. But the motion papers also revealed that Oliveri had been interviewed by defense counsel

the day before and the day after his interview with the prosecuting attorney. At one of these interviews, according to the affidavits in support of the motion, defense counsel ascertained that Oliveri had a criminal record and on that account decided not to call him as a witness. But, according to the supporting affidavits, the appellants never knew that Oliveri had information helpful to the defense. Why the defense should have rejected Oliveri as a witness because of his prior record before knowing whether he had helpful evidence, is unexplained. However that may be, under all the circumstances appearing of record we think it would be fantastic to sustain a charge of an improper suppression upon the failure of the prosecution either to sponsor a witness whom the defence had rejected as lacking in credibility, or to inform the appellants of information derived from their own employee who was in immediate contact with appellants' counsel. The charge of suppression is reminiscent of a tactic as old as the art of warfare which recognizes that there are times of adversity when a vigorous offense is the best defense available.

We affirm the denial of a new trial on Judge Walsh's penetrating (unreported) opinion the vitality of which, in our judgment, is unimpaired by the appellants' assault. The ruling is in accord with authoritative precedent. *Nardone* v. *United States*, 308 U. S. 338, 342. See also *United States* v. *Costello*, 2 Cir., 255 F. 2d 876, cert. denied 357 U. S. 937, reh. denied November 24, 1958. Moreover, "it does not clearly appear that the findings are not supported by any evidence." It follows that we may not intervene. *United States* v. *Johnson*, 327 U. S. 106, 112.

Appendix A—Opinion of Court of Appeals

As to the appellant Hyman, the convictions under both indictments are reversed and the case remanded with a direction to dismiss. As to all other appellants the convictions are affirmed except that as to Fabric Garment Company and Abrams the convictions on Counts VI and VIII of Indictment 144-185 are reversed and remanded for new trial.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of December one thousand nine hundred and fifty-eight.

Present:

HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.
HON. SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FABRIC GARMENT CO., INC., MAYFLOWER MANUFACTURING CORP., JOSEPH ABRAMS, HAROLD HYMAN, MURRAY BERMAN,

Defendants-Appellants,

and

ALERT TRADING CORP. and DAVID Q. HARTMAN,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed except that as to appellant, Harold Hyman, the judgment is reversed and the action be and it hereby is remanded with the direction to dismiss in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

APPENDIX C

Statutes Involved

1. The Act of June 25, 1948, c. 645, 62 Stat. 725, 18 U. S. C. 641, as codified, reads as follows:

"§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

2. The Act of June 25, 1948, c. 645, 62 Stat. 749, 18 U. S. C. 1001 as codified, read as follows:

"§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States

knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

APPENDIX D

Government's Exhibit 177

CALCULATION OF "SHORTAGE"

	QM 8944	QM 12372	QM 21996	QM 22965	T
Serge furnished by QM to Fabric Garment Inc. in yards 56" wide	74,133	351,743	243,817	39,466	
Finished jackets delivered to QM	50,000	229,500	151,264	24,050	
Yards of Serge 56" wide for jackets	61,150	285,856	203,168	33,212	
Clippings of Serge returned to QM in yards 56" wide	8,009	40,068	26,565	4,680	
Serge unaccounted for and not returned to QM in yards 56" wide	4,974	25,819	14,084	1,574	